

CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2490

Heard in Calgary, Wednesday, 15 June 1994

concerning

CANADIAN NATIONAL RAILWAY COMPANY

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

DISPUTE:

Appeal of the discharge of Extra Gang Foreman S S. Bains for his participation in an altercation with a fellow employee during working hours which subsequently resulted in Mr. Bains stabbing the fellow employee on 30 November 1993.

JOINT STATEMENT OF ISSUE:

On 30 November 1993, an altercation took place at the work site between Mr. Bains and Machine Operator V. Bukva. During the course of this altercation, Mr. Bukva received a stab wound.

Following an investigation held 17 December 1993, Mr. Bains was discharged for the above-related infraction.

The Brotherhood contends that the grievor was acting in self-defense and that the Company is in violation of Article 18.6 of Agreement 10.1. The Brotherhood maintains that, given the particular facts in this case, the discipline assessed to the grievor was excessive and unwarranted. The Brotherhood requests that the grievor be reinstated forthwith into the position from which discharged and that he be compensated for all wages and benefits lost as a result of this matter.

The Company denies the Brotherhood's contentions and declines the Brotherhood's request.

FOR THE BROTHERHOOD:

(SGD.) G. SCHNEIDER

SYSTEM FEDERATION GENERAL CHAIRMAN

FOR THE COMPANY:

(SGD.) J. HINKLE

for: SENIOR VICE-PRESIDENT, WESTERN CANADA

There appeared on behalf of the Company:

D. Noyes	– Labour Relations Officer, Edmonton
G. C. Blundell	– Manager, Labour Relations, Edmonton
M. A. King	– Solicitor, Edmonton
B. Laidlaw	– Labour Relations Officer, Edmonton
R. Gregory	– Manager Production, Western Canada
F. Metcalfe	– Engineering Officer, Western Canada
V. Butva	– Witness

And on behalf of the Brotherhood:

P. Davidson	– Counsel, Ottawa
G. Schneider	– System Federation General Chairman, Winnipeg
D. Brown	– Senior Counsel, Ottawa
K. Deptuck	– National Vice-President, Ottawa
S. S. Bains	– Grievor

AWARD OF THE ARBITRATOR

It is not disputed that Extra Gang Foreman Bains stabbed Machine Operator V. Bukva during the course of a physical altercation between them at the commencement of the work day on Tuesday, November 30, 1993 near Mercoal, Alberta. The evidence confirms that Mr. Bukva arrived at the work site late that morning. When he proposed to drive a van to transport himself and his tools, along with other employees and their tools, from the gathering point to the location of their machines, he was instructed by Foreman Bains that he was not to drive the van. A brief altercation took place between Mr. Bukva and Mr. Bains as a result of that instruction, which may fairly be described as an episode of pushing and shoving between the two men during which Mr. Bains' hard hat was knocked to the ground. The men were separated by another employee and things quickly returned to normal.

It appears that Mr. Bains then proceeded to his truck, located at a nearby crossing, while Mr. Bukva changed into his working clothes. After a few minutes Mr. Bukva began to walk in the direction of his machine, which caused him to pass near the crossing where Mr. Bains was sitting in his truck. While there is some controversy in the evidence as to what transpired in the minutes that followed, the Arbitrator is satisfied that the following facts are made out.

Mr. Bukva approached Mr. Bains in a state of some anger. He relates, and I accept, that his general intention was to "clear the air" between himself and Mr. Bains, as there had been tension between them for some time. The accounts of a number of witnesses vary as to whether the door of Mr. Bains' truck was open, and indeed as to whether he was seated on the driver's side front seat or back seat of the truck. I do not consider it necessary to resolve any issue in respect of that detail for the purposes of the grievance. It is clear that within moments of Mr. Bukva arriving at the truck the door was open and he and Mr. Bains were again involved in a physical scuffle. Counsel for the Brotherhood submits that in fact Mr. Bukva pushed Mr. Bains back into the truck, pinning him against the seat and striking him two or three times. Mr. Bukva states that he did not strike Mr. Bains, but merely grabbed him by the front of his coveralls and shook him after Mr. Bains told him to "fuck off" as he approached him. Again, I do not consider it necessary to resolve any conflict in respect of this part of the evidence for the purposes of the grievance, in light of what next transpired.

While the two men were engaged in the renewal of their altercation Mr. Bukva felt a blow to the area of his stomach. He soon realized that in fact he had been stabbed by Mr. Bains, whereupon he fell to the ground and called for other employees to come and help him. The material before the Arbitrator reveals, beyond controversy, that at that point, as others rushed to help Mr. Bukva, Mr. Bains simply stood and looked at him for a few moments. The grievor then got into his truck alone, and drove away a distance of some 300 feet, to a point out of sight, and returned within a matter of a few minutes. Insofar as the record before the Arbitrator discloses, no explanation has been provided by Mr. Bains for his actions during that period of time. Mr. Bains refused to answer any questions, upon the advice of his lawyer, when the Company conducted its disciplinary investigation on December 17, 1993. This was clearly to protect his interests in respect of his upcoming trial on charges of aggravated assault and assault causing bodily harm, the trial of which occurred on April 27 and 28, 1994. During the trial Mr. Bains did not give evidence. In the result, the only account of events related by Mr. Bains, who did not testify at the arbitration hearing, is to be found in a statement which he provided to the RCMP at Edson, Alberta on November 30, 1993.

In that statement Mr. Bains relates that he was seated in his truck eating an apple when he was approached by Mr. Bukva. He relates that Mr. Bukva said that he was going to kill him and that he tried to pull him out of the truck. He states that Mr. Bukva then ended up on top of him. Somehow the knife which he had been using to eat the apple penetrated Mr. Bukva's stomach. The account related to the police by Mr. Bains suggests an accident rather than self-defense and contains, in part, the following:

When he tried to pull me out of the truck and punched me in the left hand side of the truck and jumped on top of me. At that time some how, while he was pushing me or pressing me or punch me while he was half on top of me the knife – I don't know how it got stuck. He came out of the truck, got off on top of me. Yelling at me and swearing at me – the same bullshit. Started walking toward the van. That is the first time I heard him call those labours to get out of the van. This guy stabbed me – this guy stabbed me, taking his shoes off and his coveralls off.

In his statement to the police Mr. Bains relates that the knife which was used was not his, and that it had been left by someone in the truck for some time. Mr. Bains states that after Mr. Bukva was stabbed he stepped out of the

truck and dropped the knife onto the ground. His statement to the police contains no reference to his driving away and sheds no light on what he did in the period of several minutes during which he is described by several other employees as having momentarily driven out of sight. It is not disputed that the knife was never found and that there was apparently no evidence of an apple at the site of the altercation. The evidence of Mr. Dale Frederick Price, an employee on the Rail Gang, given at the criminal trial, indicates that he had left a folding knife with a three inch blade on a ledge attached to the dashboard of the truck, apparently in the closed position. According to Mr. Price's testimony at the trial, he was unable to find the knife in the truck when he attempted to locate it in the company of a police officer later the same day. It has not been seen since the incident. He also related that he went back to the site with a police officer, that they searched the area and were unable to find the knife.

The trial judge acquitted Mr. Bains of both charges against him. A review of the trial transcripts discloses that he formed the opinion that Mr. Bukva was in the position of aggressor, and that, being pinned in the truck, Mr. Bains reached for Mr. Price's knife which was resting on the central console in a gesture of self defence. In his conclusions the learned judge commented:

My guess is that the accused went too far, but I am not sure, and under these particular circumstances, in my view, it would be unsafe to convict. Both charges are dismissed.

The issue before the Arbitrator is not the same as the issue before the criminal court. Neither is the evidence. As indicated above, before me is the statement Mr. Bains gave to the investigating police officer. That statement contains no clear assertion on the part of the grievor that he resorted to the use of a knife in self-defense. On the contrary, it appears to describe a circumstance in which he was using the knife to eat an apple, and that Mr. Bukva accidentally fell on it as he was on top of Mr. Bains when he pushed him back into the truck.

The totality of the material before me is troubling. Firstly, Mr. Bains has provided no explanation of his actions out of his own mouth, either to the Company or to the Arbitrator. On balance, I am satisfied that Mr. Bukva did feel a blow to his stomach, when he was stabbed. Further, the conduct of Mr. Bains immediately after Mr. Bukva fell to the ground is less than consistent with the actions of one who would claim to have been involved in an accident. He made no attempt to assist Mr. Bukva or to obtain help from others. Rather, he mysteriously disappeared for a period of several minutes, driving away in his truck. Additionally, no explanation is provided for the total absence at the scene of the knife, or of the apple which Mr. Bains said he was eating.

In my view, on the balance of probabilities, what transpired was a continuation of a scuffle, or potential fist fight during which Mr. Bains knowingly escalated matters by introducing a lethal weapon, without any warning. I am far from persuaded that it was necessary for him to use a knife to protect himself against Mr. Bukva, even if one accepts, as the Brotherhood argues and the Court accepted, that Mr. Bukva had succeeded in striking him two or three times with his fist. There is little if any significant difference in size between the two individuals and there is nothing in the evidence to suggest that Mr. Bains was in that degree of danger that would have reasonably justified resort to the use of a knife.

Mr. Bains' statements to others immediately following the incident also raise questions about the innocence of his actions. When the incident was concluded, and Mr. Bains was attempting to get the employees back to work, employee Clifford Hutchinson asked him if he had indeed stabbed Mr. Bukva, to which Mr. Bains replied that he had not, but that he had just hit him. The effect of the incident on the employees was immediate, as they refused to work under the supervision of Mr. Bains, and the day's activities were suspended. Further, the Company tabled in evidence before the Arbitrator a petition signed by over one hundred employees which states, in part:

It is our opinion as members of BMWE that if Foreman Bains is in fact returned to service the employees will not work under Foreman Bains' protection as a direct result of the stabbing of a fellow employee and past incidences that have occurred while on duty working for CN Rail.

In closing our jobs are dangerous enough without the added pressure of injury or possible death by the hand of a fellow employee.

Further to the petition, the Company directs the Arbitrator to a number of statements made by employees during the course of the disciplinary investigation indicating that several gang members had been the victims of physical abuse at the hands of Foreman Bains.

Fortunately the incident giving rise to this arbitration did not result in a fatality. Mr. Bukva was treated in hospital overnight at Edson for the stab wound. It being determined that no internal organs had been damaged, he

was released from hospital the following day. There appears to be little doubt, however, that the slightest variation in the position of the stab wound could have yielded very different results.

Canadian arbitral jurisprudence reflects a general concern for the seriousness of any altercation which takes place between employees or indeed the threat of physical harm (see, e.g., **CROA 1701**). The introduction of a weapon, and in particular, of a knife, into such an altercation is seen as an extremely serious aggravating factor (**Re Pilkington Brothers (Canada) Limited and United Glass and Ceramic Workers, Local 295 5 L.A.C. (2d) 410 (Brown)**). In the case at hand even if I accept that there was a degree of instigation on the part of Mr. Bukva, and that there was an element of self-defence in the actions of Mr. Bains in response to two or three blows from the fists of Mr. Bukva, I cannot accept that it was an appropriate or acceptable measure of self-protection for Mr. Bains, without warning, to introduce a knife into the scuffle and to stab Mr. Bukva in the abdomen, in a way which could have been fatal. On the material before me I am satisfied, on the balance of probabilities, that the Company was justified in assessing discipline against Mr. Bains for having stabbed Mr. Bukva on November 30, 1993. Given the seriousness of the incident, and the expression of concern registered on the part of a substantial number of employees, I am not of the view that this is a case in which a substitution of penalty is appropriate. For all of these reasons the grievance must be dismissed.

June 21, 1994

(Sgd.) MICHEL G. PICHER
ARBITRATOR